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Attorneys for Plaintiff MMJK, INC.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MMJK, INC.

Plaintiff,

vs.

ULTIMATE BLACKJACK TOUR, LLC

) Case No. C 07 03236 BZ

) **PLAINTIFF MMJK'S RESPONSE TO**  
) **OBJECTIONS OF DEFENDANT**  
) **ULTIMATE BLACKJACK TOUR, LLC**  
) **EVIDENCE PROFFERED BY**  
) **PLAINTIFF MMJK, INC.**

) **Date: August 15, 2007**

) **Time: 10:00 a.m.**

) **Location: Courtroom G**

) **Honorable Bernard Zimmerman**

1 Plaintiff MMJK, Inc. (“MMJK”) submits this response to Defendant Ultimate Blackjack Tour,  
2 LLC’s (“UBT”) Objections to Evidence, Docket Index No. 18

3 1. Kellerman, page 2, lines 1 through 4

4 The objection based upon lack of foundation for personal knowledge is not well taken. Mr.  
5 Kellerman is the President and Chief Executive Officer of Plaintiff. He is involved with monitoring  
6 competition (¶¶4, 6-7). He is involved with business development discussions with large companies  
7 interested in offering subscription based poker to their customers (¶9). There are many opportunities in  
8 Mr. Kellerman’s daily experiences that expose him to information from which he could learn that  
9 Defendant was aware of Plaintiff’s web site and the patent-in-suit. There is an adequate foundation for  
10 Mr. Kellerman’s personal knowledge.

11 With regard to the hearsay objection under Fed. R. Evid 802, Mr. Kellerman does not state that  
12 “X told him.” Therefore, there is no out of court hearsay statement, and the objection must be  
13 overruled.

14 2. Kellerman, Page 2, lines 7 through 10

15 Defendant’s objection based upon lack of foundation for personal knowledge must be overruled.  
16 Mr. Kellerman’s job responsibilities as President and Chief Executive Office of a company whose only  
17 business is the operation of the web site www.betzip.com surely qualifies him to make statements of  
18 belief about the conditions extant in the market. In the subject paragraph, Mr. Kellerman is expressing  
19 his belief that the presence of the Defendant in the market is causing players who might play at  
20 Plaintiff’s site to go to Defendant’s site. Mr. Kellerman has adequate personal experience for making  
21 such an observation, and these statements are a logical corollary to Mr. Kellerman’s earlier statement  
22 (Page 2, lines 5 through 6) that “UBT’s online gaming services that it offers on its Web site directly  
23 competes with the services on [Plaintiff’s] Web site.”

24 Defendant’s objection based upon impermissible opinion testimony by a lay witness is also  
25 without merit. Fed. R. Evid. 701 provides that opinion testimony by a lay witness is permissible if (1) it  
26 is rationally based upon the witness’ perception; (2) it is helpful to an understanding of the witness’  
27 testimony or to the determination of a fact in issue; and (3) it is not based upon scientific, technical or  
28 specialized knowledge within the realm of Fed. R. Evid. 702. Mr. Kellerman has explained that Plaintiff

1 will be irreparably harmed by the availability of Defendant's infringing web site which will cause  
2 players who might otherwise play at Plaintiff's site to go to Defendant's web site and play there. This  
3 leads to a loss of market share, and in Mr. Kellerman's view, irreparable harm because Plaintiff may not  
4 be able to get those customers back. This is a rational opinion based upon Mr. Kellerman's experience  
5 and knowledge of the market. This opinion is also helpful to this Court's determination of whether  
6 Plaintiff is being and will continue to be irreparably harmed by Defendant's infringement. Finally, it is  
7 not based upon scientific, technical or specialized knowledge requiring qualification of an expert. This  
8 evidence is clearly admissible and Defendant's objection must be overruled.

9 3. Kellerman, Page 2, lines 15 through 20

10 Although Defendant has lumped them together, there are three separate facts contained within  
11 the lines to which Defendant has objected. Plaintiff will address each separately. With regard to the  
12 applicability of the UIGEA to the services provided by www.betzip.com, Mr. Kellerman has the actual  
13 personal knowledge and experience in his position as President and Chief Executive Officer to make  
14 this statement from personal knowledge. The issue of the legality of the services offered at the  
15 Plaintiff's web site is an important aspect of the operation of the company. Mr. Kellerman makes it his  
16 business to be aware of such issues. Although Mr. Kellerman is not a lawyer having specialized  
17 knowledge about the applicability of the UIGEA to the Plaintiff's services, he is expressing an opinion  
18 based upon his perception.

19 Subsequent to the filing of this first Kellerman declaration, Defendant has chosen to make an  
20 issue out of whether Plaintiff's web site violates the UIGEA or conforms with its provisions. Plaintiff  
21 does not rely upon Mr. Kellerman's statement here as a basis for rebuttal. Instead, Plaintiff, through a  
22 Supplemental Kellerman declaration, introduces and relies upon a legal opinion from counsel who  
23 advised Plaintiff on this very issue. (See Supplemental Kellerman Decl., ¶13, Ex. J.) Going back to the  
24 portion of Paragraph 6 of the Kellerman Declaration to which Defendant objected, Mr. Kellerman's  
25 statement that the UIGEA did not apply to Plaintiff's services, Mr. Kellerman's statement of belief were  
26 founded upon the legal opinion now produced. Consequently, this evidence should be admitted in  
27 conjunction with the evidence contained within the Supplemental Kellerman Declaration.

1 The second fact in the subject statement involves Mr. Kellerman's observation that the passage  
 2 of the UIGEA has resulted in millions of customers looking for alternative places to play. As an active  
 3 market participant, Mr. Kellerman has the ability to observe the market and make comments about the  
 4 behavior of players in the market. He is entirely qualified to make this statement based upon personal  
 5 experience. With regard to it being a lay opinion, it is actually a belief or statement of fact. Mr.  
 6 Kellerman never says "it is my opinion that..." Even if it is considered an expression of opinion, it is  
 7 nonetheless rationally based on his perception of the market, it is helpful to the Court to understand the  
 8 market conditions and it is not the subject ordinarily reserved for expert testimony. This fact in Mr.  
 9 Kellerman's declaration should not be excluded.

10 The final portion of the objection relates to the statement that begins with "I believe..." Clearly,  
 11 this is a statement of Mr. Kellerman's belief. As such, his personal knowledge of the impact of the  
 12 UIGEA in the market, and his well-informed belief about the legality of Plaintiff's services cannot be  
 13 assailed. Therefore, lack of foundation for personal knowledge is not a well taken objection. Similarly,  
 14 any objection that Mr. Kellerman is offering a lay opinion is undercut by the language of the sentence  
 15 that starts "I believe..." The objection based upon Fed. R. Evid. 701 must be overruled.

16 4. Kellerman, Page2, lines 22 through 25

17 Plaintiff submits that there is no basis for Defendant's hearsay objection. There is no out of  
 18 court statement repeated by declarant. The use of the phrase "it is well known in the industry" does not  
 19 convert the balance of the statement into hearsay.

20 With regard to the lack of foundation in personal knowledge objection, Mr. Kellerman is  
 21 expressing his beliefs and understanding about the market, and the potential impact that UBT might  
 22 have on the Plaintiff's business. Mr. Kellerman is in a good position to be providing his beliefs because  
 23 of his role as Plaintiff's President and Chief Executive Officer. As to the lay opinion objection, this  
 24 statement qualifies under the provisions of Rule 701 as quoted above.

25 5. Kellerman, Page 3, lines 15 through 17

26 Mr. Kellerman is providing evidence on the conditions in the market, and is predicting what  
 27 would happen if Defendant were able to continue with its marketing and advertising of the infringing  
 28 service. The quoted evidence represents Plaintiff's beliefs on what would happen. Mr. Kellerman is in

1 as good a position as anyone to predict the impact upon Plaintiff from Defendant's marketing and  
2 advertising efforts. Moreover, it is not an opinion. Defendant's objections should be overruled.

3 6. Kellerman, Page 3, lines 19 through 23

4 All of Defendant's objections are without basis. Mr. Kellerman establishes in Paragraph 9 that  
5 Plaintiff has been involved in a number of business development discussions with large companies  
6 interested in offering Plaintiff's services to their customers. Mr. Kellerman is aware of the terms of  
7 these deals and the impact that these deals might have on the Plaintiff's business. Moreover, he has the  
8 ability to perceive what could happen if Defendant were to get the deal rather than Plaintiff. There is no  
9 lack of personal knowledge by Mr. Kellerman. With regard to the hearsay objection, Mr. Kellerman has  
10 not offered an out of court statement by a third party. His statement is one of his understanding. It is  
11 not hearsay.

12 7. Kellerman, Page 3, line 26 through Page 4, line 1

13 Plaintiff cannot even imagine a basis for Defendant's objection based upon hearsay.

14 With regard to the other objections, Mr. Kellerman's understanding of the market provides him  
15 with a foundation in personal knowledge for the statements made. Moreover, there is nothing in the  
16 quoted portion that would constitute a lay opinion beyond Mr. Kellerman's qualifications to provide  
17 one.

18 Dated: August 1, 2007

DERGOSITS & NOAH LLP

20  
21 By: /s/ Todd A. Noah

Todd A. Noah

Attorneys for Plaintiff MMJK, INC.